U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: JUN 15 2004

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner performs postal business and communication services. It seeks to employ the beneficiary permanently in the United States as a graphic designer. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

Provisions of 8 C.F.R. § 204.5(g)(2) state:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered from the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). The petition's priority date in this instance is October 26, 2001. The beneficiary's salary as stated on the labor certification is $43,000 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE) dated January 22, 2003, the director required additional evidence to establish the petitioner's ability to pay the proffered wage. The record already had the petitioner's 2001 Form 1120S, U.S. Income Tax Return for an S Corporation. The RFE exacted the petitioner's 2002 corporate tax return and the beneficiary's 2001 and 2002 Wage and Tax Statements (W-2s), as evidence of wage payments to the beneficiary.

Counsel submitted the petitioner's 2002 Form 1120S and the beneficiary's 2001 and 2002 W-2s. The W-2s, respectively, showed actual wages paid to the beneficiary of $11,593.96 and 12,146,22, less than the proffered wage. Federal tax returns for 2001 and 2002, respectively, reflected ordinary losses from trade or business activities of ($301,895) and ($174,421), less than the proffered wage.

The director and counsel did not consider net current assets, as reported in Schedule L of the federal tax returns. They equal the difference of the taxpayer's current assets minus current liabilities. Current assets include cash, receivables, marketable securities, inventories, and prepaid expenses, generally, with a life of one year or less. Current liabilities consist of obligations, such as accounts payable, short term notes payable, and accrued expenses, such as taxes and salaries, payable within a year or less. *See Barron's Dictionary of Accounting Terms* 117-118 (3rd ed. 2000). Current assets and current liabilities appear, respectively, on designated lines of Schedule L of Form 1120S. If net current assets meet or exceed the proffered wage, the petitioner has demonstrated the ability to pay it for the given period. For 2002, however, net current assets were $4,067, less than the proffered wage. For 2001, current liabilities exceeded current assets.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage at the priority date, and continuing until the beneficiary obtains lawful permanent residence, and denied the petition.

On appeal, counsel submits the petitioner's unaudited financial statements and accountant's compilation report as of December 31, 2001 and 2002 (unaudited reports) with the accountant's opinion dated May 19, 2003 (opinion letter).

Counsel states on appeal:

> I. The Service [Citizenship and Immigration Services (CIS), formerly the Service or INS] erred in its determination that the petitioner does not have the financial ability to pay the proffered salary.

Also, the opinion letter says that the petitioner has the ability to pay the proffered wage continuously from the priority date. Notes 1 and 2 of the unaudited reports aver that CIS must "add back" two (2) expenses to income, for 2001 and 2002.

One is annual depreciation of $10,815 and of $6,370, respectively. In determining the petitioner's ability to pay the proffered wage, CIS will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Tex. 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *aff'd* 703 F.2d 571 (7th Cir. 1983).

In *K.C.P. Food Co., Inc.*, 623 F.Supp at 1084, the court held that CIS had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See also Elatos Restaurant Corp.*, 632 F.Supp. at 1054.

The other "add back" arises, it is said, from "shareholder interest paid to shareholder" of $78,949 and $82,880 in 2001 and 2002. Note 1, however, concedes that the unidentified shareholder included it on his or her 2001 and 2002 Forms 1040, U.S. Individual Income Tax Return.

Counsel files no brief, and Notes 1 and 2 cite no authority for the consideration of interest expense claimed on the shareholder's Form 1040 as a corporate asset. To the contrary, CIS may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. *See Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage.

Notes 1 and 2 suggest that the Passive Activity Loss (PAL) Rule and the Internal Revenue Code (IRC) encourage the payment of interest on shareholder loans because non-recourse loans are considered as additional paid in capital. Even if the payment of interest was to comply with the PAL rule, it is still a real expense of the company. If the accountant is suggesting that the payments represented as real expenses to the Internal Revenue Service (IRS) on the petitioner's tax returns and as real income to the IRS on the shareholder's tax return were, in fact, fiction, that cash should be represented as cash on Schedule L and has already been considered in calculating the petitioner's net current assets. Moreover, reporting fictitious interest payments to the IRS reduces the petitioner's credibility in these proceedings.

Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

The petitioner first presented unaudited reports in the accountant's compilation report on appeal, as proof of the ability to pay the proffered wage. Unaudited statements are of little evidentiary value because they are based solely on the representations of management. Therefore, the regulation requires audited financial statements. *See* 8 C.F.R. § 204.5(g)(2), *supra*.

After a review of the federal tax returns, W-2s, the opinion letter, and unaudited reports with Notes 1 and 2, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.